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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 329

T. W. JONES GRAIN COMPANY,
Petitioner,

vs.

STATE OF NEBRASKA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA AND BRIEF IN SUPPORT THEREOF

✓ CHARLES M. BOSLEY,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 329

T. W. JONES GRAIN COMPANY,

Petitioner,

vs.

STATE OF NEBRASKA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States of America:

The Petition of the T. W. Jones Grain Company respectfully shows:

Summary Statement of Matters Involved

This is an action originally brought by the State of Nebraska, in the District Court of Hitchcock County, Nebraska, as an appeal to that Court from the findings and decision of the County Board of Equalization of Hitchcock County, Nebraska, wherein the County Board of Equalization determined the value of the personal property of petitioner for taxation assessment for the year 1951. The State

of Nebraska alleged in the District Court of Hitchcock County, Nebraska, that the assessed value of such personal property was too low, and that the amount of the value determined for taxation purposes should be increased.

Upon the trial of the case in the District Court of Hitchcock County, Nebraska, that Court entered judgment in favor of the petitioner and dismissed the appeal of the State of Nebraska. The State of Nebraska appealed from that decision to the Supreme Court of Nebraska and the Appellate Court reversed the judgment of the District Court of Hitchcock County, Nebraska.

The specific property involved which is the subject of the controversy, is whether or not about five train car loads of wheat, sold under a written contract, dated February 2, 1951, between petitioner of Trenton, Nebraska, and the Klecan Grain Company of Kansas City, Missouri, for shipment by rail from Trenton, Nebraska, to Kansas City, Missouri, but which remained unshipped on March 10, 1951, the assessment date, should be included as tangible personal property for assessment. The aforesaid contract for the sale of wheat covered ten train car loads, five had been shipped and delivered thereunder prior to March 10, 1951, and five train car loads were in petitioner's grain elevator on that date solely because petitioner was unable to procure cars from the railroad company for shipment, but that as soon as cars could be obtained, the remaining five train car loads of wheat were shipped in conformity with the provisions of said contract of sale. In the opinion rendered by the Supreme Court of Nebraska, which appears of record hereto attached, that Court adjudged that the five train car loads of wheat unshipped on March 10, 1951, should be included as a part of the tangible personal property of petitioner for assessment, and that it was not in interstate commerce under the circumstances.

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Following the entry of the opinion by the Supreme Court of Nebraska, petitioner filed a motion for re-hearing before that Court, but on June 13, 1953 that court overruled the motion, and upon application of petitioner for a stay of mandate pending appeal to the United States Supreme Court, the Supreme Court of Nebraska ordered that the mandate not issue until September 13, 1953.

Statement of Jurisdiction

The main point in the case is whether the wheat sold by petitioner and purchased by the Klecan Grain Company under the contract of sale, dated February 2, 1951, to be shipped from Trenton, Nebraska, to Kansas City, Missouri, is under the circumstances, immune from state taxation by virtue of Art. I, Sec. 8, Clause 3, of the Constitution of the United States.

The testimony is undisputed that the ten train car loads of wheat were sold under the aforesaid contract and that the contract was consummated between the parties exactly in accordance with its terms and provisions. It is also undisputed that the five train car loads were shipped before March 10, 1951, and the remainder after that date, and the sole reason for not all of the wheat having been shipped prior to that date was due to the inability of petitioner to procure and obtain box cars from the railroad company for that purpose. It is undisputed that petitioner received a payment of $2000.00 on the remaining unshipped five car loads of wheat prior to March 10, 1951.

There is no allegation or proof, directly or by inference, that the delay in the shipment under the contract was for the pleasure, will, use, convenience, desire, profit or the business exigencies of the petitioner or the purchaser, but all of the evidence revealed that petitioner shipped the wheat under this contract after February 2, 1951 as rapidly

as he could obtain box cars from the railroad company, and that it was so shipped.

Questions Presented

The questions presented to the Court in this case are:

1. Where a movement of goods, (in this case wheat) has begun in interstate commerce under a contract of sale, does a temporary interruption in the movement and transit over which the parties have no control, and which is not for the pleasure, will, use, convenience, desire, profit or the business exigencies of the parties, cause the goods (wheat), while so detained, to be removed from interstate commerce so as to be subject to State property taxation under such circumstances?

2. Is a sale of goods a transaction in interstate commerce if interstate transportation of the subject matter is essential to its completion, and are such goods, while in interstate commerce, immune from State property taxation?

3. Specifically in this case, petitioner had sold under written contract ten train car loads of wheat to a purchaser in another State; was in the process of shipping the wheat, but due to his inability to obtain box cars from the railroad company, the shipping was interrupted, but as soon as box cars could be obtained, the shipment under the contract was completed; that the delay caused by the box car shortage was not for petitioner's pleasure, will, use, convenience, desire, profit or the exigencies of business; is that portion of the wheat sold under the contract, but so delayed in shipment, subject to State property taxation by the State of Nebraska?

Proceedings Before the County Board of Equalization and the Trial Court

The County Board of Equalization of Hitchcock County, Nebraska, at a hearing held on July 25, 1951 found that the tax return of the personal property of petitioner for the year 1951 should be accepted as a true and correct return of its value in the market in the ordinary course of trade of the personal property of the petitioner liable to assessment on March 10, 1951.

The State of Nebraska appealed the decision of the County Board of Equalization to the District Court of Hitchcock County, Nebraska. Trial *de novo* in that Court was had on May 20, 1952 and judgment therein rendered in favor of petitioner and the appeal of the State of Nebraska was dismissed. The State of Nebraska presented no evidence or testimony relating to the value of the property of petitioner, or that any property was omitted from its tax schedule which should have been included, except to argue that the five train car loads of wheat sold under the Klecan Grain Company contract aforesaid, but awaiting the cars for shipment, should be included and assessed. The bill of exceptions of all of the testimony in the case is before this Court as part of the record herein. Petitioner contended before the District Court of Hitchcock County, Nebraska, that there was no evidence in the case to support the allegations of the amended petition of the State of Nebraska.

A brief analysis of the evidence shows the following:

1. Petitioner is a grain dealer in the town of Trenton, Hitchcock County, Nebraska, and in the regular course of business entered into a written contract on February 2, 1951, with the purchaser, the Klecan Grain Company of Kansas City, Missouri, for the sale and delivery of ten train car loads of wheat to be delivered to the purchaser

at Kansas City, Missouri; that the wheat committed to the contract was in petitioner's elevator, and that it was accorded to the contract and shipped as quickly as box cars could be obtained from the railroad company.

2. The sole and only reason all of the wheat was not shipped under the contract prior to March 10, 1951 was because box cars could not be obtained from the railroad company by the petitioner although it had made every effort to obtain such box cars.

3. The undisputed testimony reveals that the money used in the purchase and sale of the wheat under the contract for taxation purposes is accounted for by petitioner in computation of average invested capital as provided by the laws of the State of Nebraska. Sec. 77-1224, R.S. Nebr. 1943, Reissue of 1950.

"Personal Property; Grain Brokers, Motion Picture Distributors, Sugar Manufacturers and Oil Dealers; Assessment of Tax on Invested Capital."

> "The assessor shall determine the average amount of the total investment in the business, and the amount, if any, by which the average total investment exceed the value of the real estate and tangible property separately assessed. In determining the excess of the total investment, he shall take into consideration the purchases and sales during the year, and for that purpose he shall have the right to inspect all books of account, check books and other records. The excess, if any, of the average total investment shall be separately listed and shall be taxed at the same rate as the tangible property and this tax shall be in lieu of all other taxes thereon."

4. No part of the wheat shold under the contract was detained by petitioner for his pleasure, will, use, convenience, desire, profit or the exigencies of business while

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it was awaiting box cars from the railroad company in which to ship the wheat, and that all of the wheat under the contract was in accordance with its terms and provisions shipped, delivered and accepted as intended by the parties to the contract without exception.

Decision of the Supreme Court of Nebraska

The crux of the decision of the Supreme Court of Nebraska may be established from the opinion as follows:

1. The Court admits, "The seller had not been able to secure railroad cars in which to transport it (wheat) to the purchaser though he had made all possible efforts to do so. This wheat was shipped to the purchaser in Kansas City, Missouri, commencing March 12, and ending March 22, 1951. The grain tendered by appellee to the purchaser in fulfillment of the contract complied with the requirements of it and was accepted by the purchaser with that effect."

2. "Appellee justifies its omission of the grain from its statement of property for taxation by the assertion that the wheat in its elevator was the subject of the contract between it and the Klecan Grain Company of February 2, 1951, and that from that date until the grain was delivered in Kansas City, as the contract required, it was interstate commerce and as such the State of Nebraska was powerless to impose a tax upon it. If the premise of appellee in this regard is true the conclusion is indisputable."

3. "It is shown that this grain (wheat) would have been transported to the agreed destination before March 10, 1951, if the railroad company had been able to respond to the entreaties of appellee for box cars in which to make the shipment of it. However, the fact that property is intended or destined for removal from a state does not impress it with the character of interstate commerce so as to render it immune from state taxation by virtue of the operation

of the commerce clause of the Federal Constitution of the United States."

Reasons Relied on for Allowance of Writ

1. The judgment is contrary to the facts contained in the bill of exceptions.

2. The evidence is insufficient to support the judgment and opinion of the Court.

3. The judgment is contrary to the law applicable to this case.

4. As interpreted by the Court, the law cited in the opinion does not apply to the facts in this case.

5. All of the pertinent facts and law were not properly evaluated by the Court.

6. Your petitioner respectfully shows to the Court that this is a case of great importance to your petitioner, and to the public in general, arising out of the fact that, as appears from the evidence in this case, if the opinion of the Supreme Court of Nebraska is to stand, it is a departure from the law, and precedents long established and followed by the United States Supreme Court upon like and similar matters.

The opinion of the Supreme Court of Nebraska presents a new approach to the interpretation of the interstate commerce clause of the United States Constitution, and if allowed to stand, it will result in a great loss to your petitioner, and establish a new and different interpretation of the interstate commerce clause, not now supported by law and the former decisions of the United States Supreme Court.

Your petitioner shows the Court in the brief hereto attached that the opinion of the Supreme Court of Nebraska is not supported by the decisions of this Court, and that practically the identical questions have been decided directly

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opposite to the opinion of the Supreme Court of Nebraska in this case.

Therefore, to allow the opinion of the Supreme Court of Nebraska to remain unreversed, the result will be to encroach upon interstate commerce in a manner never intended and contrary to the established law of the land, to the extent that great prejudice will result against petitioner and persons likewise situated in Nebraska.

It is respectfully submitted by petitioner that it is necessary that this Honorable Court settle the question, not only on account of its importance, but also on account of the fact that the decision of the Supreme Court of Nebraska conflicts with the decisions of the United States Supreme Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of Nebraska to the end that the judgment of the Supreme Court of Nebraska may be reviewed and reversed by this Honorable Court.

T. W. JONES GRAIN COMPANY,
Petitioner,

By CHARLES M. BOSLEY,
Counsel and Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION

Statement of Jurisdiction

The jurisdiction of the Supreme Court of the United States is invoked under Article 1, Section 8, Clause 3, of the Constitution of the United States by virtue of a contract for the sale and delivery of wheat between the petitioner of Trenton, Nebraska, and the Klecan Grain Company of Kansas City, Missouri.

Decisions Below

County Board of Equalization:

The County Board of Equalization of Hitchcock County, Nebraska, at hearing held on July 25, 1951, found that the personal property tax return of petitioner for the year 1951 should be accepted as a true and correct return of the value of such personal property in the market and in the ordinary course of trade, on the assessment date, March 10, 1951. (R. 4-5.)

District Court:

On appeal from the findings of the Board of Equalization to the District Court of Hitchcock County, Nebraska, by Respondent, the Court on trial *de novo* entered judgment in favor of petitioner and dismissed the appeal. (R. 13 and 14.)

Supreme Court:

Respondent then appealed from the decision of the Hitchcock County District Court to the Supreme Court of the State of Nebraska, and on April 24, 1953, the Court entered its opinion and reversed the lower Court. (R. 42 to 48, inc.; 58 N. W. 2nd 212.) Petitioner's motion for re-hearing was denied on June 13, 1953.

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Statement of Facts

The petitioner is, and was during all of the time involved herein, a grain broker engaged in the buying and selling of grain, with his place of business in Trenton, Hitchcock County, Nebraska. The Klecan Grain Company is a grain commission company in Kansas City, Missouri.

Petitioner had on hand in his grain elevator in Trenton, Nebraska, on February 2, 1951, ten train car loads of wheat, which on that date, it sold, under written contract (Exhibit No. 6, R. 39 and 40), to the Klecan Grain Company of Kansas City, Missouri, for delivery by rail within sixty days, to the purchaser in Kansas City, Missouri.

Petitioner, following February 2, 1951, commenced to ship the wheat to the purchaser, and by March 10, 1951, had delivered five car loads of wheat (R. 32-33), which was paid for in full according to the contract entered into prior to March 10, 1951, and in addition, petitioner on February 15, 1951, drew a draft on purchaser for $2800.00 on the contract (R. 36, Line 28). The wheat as shipped, was paid for by petitioner drawing sight drafts on purchaser (R. 23). When the wheat was shipped following the drawing of sight drafts by petitioner at the time of loading out the cars, the purchaser paid such over amounts as were required when the wheat was actually graded. (R. 35.) All of the wheat would have been shipped prior to March 10, 1951, if the petitioner had been able to obtain box cars from the railroad (R. 23) (R. 24).

About five car loads of wheat remained unshipped in petitioner's elevator on March 10 of this contract, because the railroad, due to a box car shortage, was unable to furnish cars to petitioner to ship the wheat before that date, but as soon as cars were available, the remainder of the wheat sold under the contract was shipped, delivered, accepted and paid for in accordance with the terms of the

contract, and before the expiration of the sixty day period. (R. 24.) (R. 27.)

The only wheat petitioner had in his elevator on March 10, 1951, was the remaining portion of the wheat sold under the contract (R. 22) (R. 22-23), except ground feed (R. 22) in the value of $365.00.

Petitioner excluded from the assessment for taxation, under the circumstances, all of the wheat committed to the Klecan Grain Company contract.

All of the wheat by the terms of the contract was to be shipped and delivered to Kansas City, Mo., and it was so shipped and delivered. None of the wheat was repurchased by petitioner from the Klecan Grain Company, (R. 28).

March 10 of each year is the date for the assessment of general personal property in Nebraska.

Petitioner filed an amended assessment schedule on April 7, 1951, (Exhibits No. 1 and 2, R. 38A and 38C) in the Office of the County Assessor of Hitchcock County, Nebraska. Exhibit No. 2 relates to the computation of average invested capital, and the average as determined, $6450.00, was carried to Paragraph "G" of Exhibit No. 1. It was to Paragraph "G" that respondent directed its attack in all of these proceedings. Respondent takes the position that regardless of the circumstances in the case, that portion of the wheat sold under the contract, which had not been actually delivered to the railroad or was not in movement out of the State on March 10, 1951, should be subjected to State taxation, and that it was not in interstate commerce.

The questions presented to the Court in this case are:

1. Where a movement of goods, (in this case wheat) has begun in interstate commerce under a contract of sale, does a temporary interruption in the movement and transit over which the parties have no control, and which is not for the pleasure, will, use, convenience, desire, profit or the busi-

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ness exigencies of the parties, cause the goods (wheat), while so detained, to be removed from interstate commerce so as to be subject to State property taxation under such circumstances?

2. Is a sale of goods a transaction in interstate commerce if interstate transportation of the subject matter is essential to its completion, and are such goods, while in interstate commerce, immune from State property taxation?

3. Specifically in this case, petitioner had sold under written contract ten train car loads of wheat to a purchaser in another State; was in the process of shipping the wheat, but due to his inability to obtain box cars from the railroad company, the shipping was interrupted, but as soon as box cars could be obtained, the shipment under the contract was completed; that the delay caused by the box car shortage was not for petitioner's pleasure, will, use, convenience, desire, profit or the exigencies of business; is that portion of the wheat sold under the contract, but so delayed in shipment, subject to State property taxation by the State of Nebraska?

Summary and Argument

On February 2, 1951, petitioner entered into a written contract with the Klecan Grain Company for the sale of ten car loads of wheat to be shipped from petitioner's grain elevator in Trenton, Nebraska, to Kansas City, Missouri, in the usual course of trade, within sixty days, in accordance with the terms of the contract.

From the date of the contract to March 6, 1951, petitioner did ship and deliver five car loads of the wheat. Because of a box car shortage, he was unable to obtain box cars from the railroad to ship the remainder of the wheat before March 10, 1951, although he made every effort to secure the cars for this purpose. It is shown that all of

this wheat would have been transported to the agreed destination before March 10, 1951, if the railroad had been able to respond to the entreaties of petitioner for box cars in which to make shipment of it.

It was the sole intention of the parties to the contract that the wheat sold thereunder would be delivered as provided by the terms of the agreement. It was so delivered and the contract was carried out in every respect strictly in accordance with its terms and conditions.

On March 10, 1951, the petitioner had on hand in his elevator only the wheat which had been sold under the contract, and which was awaiting box cars for shipment.

Petitioner urges that all of the wheat sold and delivered under the contract with the Klecan Grain Company is immune from State taxation by virtue of the operation of the Commerce Clause of the U. S. Constitution, Article 1, Section 8, Clause 3, Constitution of the United States, as governed by the facts and the law relating thereto.

Petitioner further urges that the ten car loads of wheat sold under this contract entered into interstate commerce on February 2, 1951, the date of the contract, and that exportation of the wheat commenced a few days later and continued without interruption save only for the time during which petitioner was unable to obtain box cars from the railroad company and the undisputed testimony shows that if the petitioner had been able to obtain such box cars all of the wheat would have been delivered prior to March 10, 1951.

American Steel & Wire Co. v. *Speed*, 192 U. S. 500.
Bacon v. *Illinois*, 227 U. S. 504, 33 S. Ct. 299, 57 L. Ed. 615.
Brown v. *Huston*, 114 U. S. 622.
Carson Petroleum Co. v. *Vial*, 279 U. S. 95, 101.
Champlain Realty Co. v. *Brattleboro*, 260 U. S. 366, 43 S. Ct. 146, 67 L. Ed. 309, 25 A.L.R. 1195.

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Coe v. *Errol*, 116 U. S. 517, 6 S. Ct. 475, 29 L. Ed. 715.
Cornell v. *Coyne*, 192 U. S. 418.
Dahnke-Walker Mill Co. v. *Bondurant*, 257 U. S. 282.
Diamond Match Co. v. *Ontonagon*, 188 U. S. 82, 47 L. Ed. 394.
Empresa Siderurgicia v. *County of Merced*, 337 U. S. 154, 69 S. Ct. 995, 93 L. Ed. 1276, Ann., 11 A.L.R. 2d 938.
General Oil Co. v. *Crain*, 209 U. S. 211.
Hughes Bros. Co. v. *Minnesota*, 272 U. S. 469, 47 S. Ct. 170, 71 L. Ed. 359.
Independent Warehouses, Inc. v. *Scheele*, 331 U. S. 70, 67 S. Ct. 1062, 91 L. Ed. 1346.
Joy Oil Co. v. *State Tax Commission*, 337 U. S. 286, 93 L. Ed. 1366.
McGoldrick v. *Berwind-White Co.*, 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565.
Minnesota v. *Blasius*, 290 U. S. 1, 54 S. Ct. 34, 78 L. Ed. 131.
Pittsburg and Southern Coal Co. v. *Bates*, 156 U. S. 577.
Railroad Commission of La. v. *Texas & Pacific Railway Co.*, 229 U. S. 336.
Richfield Oil Corp. v. *State Board of Equalization*, 329 U. S. 69, 79, 67 S. Ct. 156, 91 L. Ed. 80.
Spalding and Bros. v. *Edwards*, 262 U. S. 66.
Superior Oil Co. v. *State of Miss.*, 280 U. S. 390.
Susquehanna Coal Co. v. *South Amboy*, 228 U. S. 665.
Texas & New Orleans R. R. Co. v. *Sabine Tram Co.*, 227 U. S. 111.
Thames & Mersey Marine Ins. Co. v. *United States*, 237 U. S. 19.
Tredway v. *Riley*, 32 Neb. 495, 49 N. W. 268.
Turpin v. *Burgess*, 117 U. S. 504.
Von Hamm-Young Co. v. *City and County of California*, 29 Cal. 2d 798, 171 A.L.R. 274, 178 P. 2d 745.

The cases all fall very distinctly into two categories with a clear dividing line. This Honorable Court has repeatedly pointed out what, under similar circumstances, defines prop-

erty alleged to be in interstate commerce and subject to state taxation, and what factors must be present for it to be included or excluded in connection with state taxation. The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption or delay of the transportation during which the tax is sought to be levied. Where property has come to rest within the state, being held there at the pleasure, will, use, convenience, desire, profit or other business exigencies of the party or parties so that he, or they, may dispose of it either within the state, or for shipment elsewhere as business interests dictates, it is deemed to be a part of the general mass of property within the state and is subject to its taxing power, but where there has been a sale of goods by a seller in one state to a purchaser in another which to complete envisions interstate commerce, a temporary interruption in the shipment over which the parties have no control and which is not for the pleasure, will, use, convenience, desire, profit or other business exigencies of the party, or parties, will not remove the goods from interstate commerce so as to subject them to state taxation. Of the foregoing cases *Hughes Bros. Co.* v. *Minnesota,* 272 U. S. 469, 47 S. Ct. 170, 71 L. Ed. 359, *supra,* we find facts closely resembling those in the instant case and the manner in which the law was applied by this Honorable Court in that case.

> "* * * In October 1921, the Timber Company had made a contract with the Central Paper Company * * *. By that contract the Timber Company agreed to deliver to the Paper Company, over the rail of the Paper Company's vessels at the mouth of the Pidgeon River, approximately 10,000 cords spruce pulp wood. The Timber Company agreed to load the wood into them as promptly as possible after its arrival. The Paper Company was to give to the Timber Company

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three days' notice of the arrival of its vessels at the booms where the logs were held. The wood was to be scaled and measured by a representative of both parties when the first cargo was loaded, and also on arrival at Muskegon, Mich., the measurement at Muskegon to be the basis for final settlement. The price per cord was to be $12.00. The Paper Company agreed to make progress estimates or provisional measurements during the months of January, February and March at river loadings, and an advance of $3.00 per cord for all wood inspected and measured, its inspector to be properly assisted by the Timber Company. The title to the wood on which advances were made was to be in the name of the Paper Company and to be branded at the time of provisional inspection and measurement. The Paper Company agreed to advance the second 25 percent, or $3.00 per cord, when the wood was delivered in the Pidgeon River booms, and the balance, or $6.00 a cord, within five days after its delivery at Muskegon * * *. The hauling and placing of the logs on the ice and on the banks of the Swamp River were completed the latter part of March. When the ice broke, April 29, 1922, the drive of the logs began; those on the ice moved of themselves, and those on the banks were pushed in. The drive was conducted by the Timber Company's men. It had lasted 18 days when the logs reached the Pidgeon River booms. By the latter part of July, all the logs had been shipped by vessels of the Paper Company on the lake to Muskegon.

We do not think it important, for purposes of this case to decide where the title to the timber was at the time the drive began * * *. The contract and the method of complying with it, are all circumstances, however, throwing light on the question whether the transportation in interstate commerce began at the beginning of the drive, when the ice broke up, or at the point of loading on the lake.

The Timber Company was under contract to float the timber down from the place of piling on the Swamp

River and deliver it as promptly as possible * * *. Had the Timber Company or some one claiming under it attempted to stop the driver after it had begun, and interfered with the passage of the timber * * * it would have been a breach of sale. All this characterizes what was being done in the drive between the Swamp River entrepot and the mouth of the Pidgeon River. That was the beginning or first leg of the interstate journey. The obligation of both parties accorded with that view. The change in the method of transportation by floating to carriage on a vessel did not affect the continuity of the interstate passage, if such a passage was intended by the parties and had begun, any more than did shipment by local railroad bills of lading from a point in a state to a part of the same state, for shipment by vessel for foreign commerce.

The case seems to us to come within the ruling of this Court in the case of Champlain Realty Co. v. The Town of Brattleboro, 260 U. S. 366, 43 S. Ct. 146, 67 L. Ed. 309 * * *. This Court distinguished the facts in that case from the facts in the main case discussed in Coe v. Errol, 116 U. S. 517, 6 S. Ct. 475, 29 L. Ed. 715, *as they can be distinguished here.* (Italics ours) It is clear that the entrepot or depot for the interstate shipment of logs was the Swamp River. The drive in the two rivers, though under the direction of the Timber Company, was not gathering the logs for subsequent interstate shipment; *it was the interstate movement itself.* (Italics ours) Both parties had bound themselves to it, the logs were segregated and were moving in the contemplated journey which neither could prevent if they carried out their agreement. The delays in the continuity of movement were only incidental to the journey and the necessary change in the mode of transportation by which the logs were carried from a place in one state to a place agreed upon in another. *The conclusion in cases like this must be determined from the various circumstances.* (Italics ours) Mere intention by the owner ultimately to send the

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logs out of the state does not put them in interstate commerce, nor does preparatory gathering for that purpose, at a depot. It must appear that the movement for another state has actually begun and is going on. Solution is easy when the shipment has been delivered to a carrier for a destination in another state. It is much more difficult when the owner retains complete control of the transportation and can change his mind and divert the delivery from the intended interstate destination, as in the Champlain Realty Co. v. Brattleboro case, supra. The character of the shipment in such a case depends upon all the evidential circumstances looking to what the owner has done in the preparation for the journey and in carrying it out. *The mere power of the owner to divert the shipment already started does not take it out of interstate commerce, if the other facts show that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in furtherance of the intended transportation, as in the Champlain case, supra* (Italics ours) Here the case is even stronger in that the owner and initiator of the journey could not by his contract divert the logs after they had started from Swamp River without a breach of contract made by him with his vendee, who, by the agreement of sale, divided with him the responsibility for the continuous interstate transportation. The judgment of the Supreme Court of Minnesota is reversed."

In *Spalding and Bros.* v. *Edwards*, 262 U. S. 666, *supra*, this Honorable Court defined the factors which place goods into interstate commerce and the factors in that case substantially reflect the factors in this case. There the Court said:

"The expected and accomplished effect of the act was to start them for that port. The fact that further acts were to be done before the goods would go to sea does not matter so long as they were only the regular steps to the contemplated result. Getting the

bill of lading stands no differently from putting the goods on board ship. Neither does it matter that the title was in Scholtz & Co. (seller commission merchants), and that theoretically they might change their minds and retain the bats for their own use. There was not the slightest probability of any such change and it did not occur. The purchase by Scholtz & Co. was solely for the purpose of Delgado & Cid (purchaser) and for their account and risk. Theoretical possibilities may be left out of account. Railroad Commission of La. v. Texas & Pacific Ry. Co., 229 U. S. 336, and Texas & New Orlegans R. R. Co. v. Sabine Tram Co., 227 U. S. 111 * * *. To put it as any later point would fail to give to exports the liberal protection that hitherto they have received; of which an example may be seen in Thames & Mersey Marine Ins. Co. v. United States, 237 U. S. 19."

Further in *Champlain Realty Co.* v. *Brattleboro*, 260 U. S. 366, supra,

> "A temporary interruption in an otherwise continuous interstate journey, if caused by factors beyond the control of the shipper, or if it is merely in furtherance of the intended transportation, does not take the goods out of interstate commerce. It is only if the purpose of the interruption is unrelated to the transportation of the goods that the interruption terminates the interstate journey and removes the property from the protection of the commerce clause."

In analyzing the precedent established in *Hughes Bros. Co.* v. *Minnesota*, 272 U. S. 469, 47 S. Ct. 170, 71 L. Ed. 359; *Spalding and Bros.* v. *Edwards*, 262 U. S. 66; *Champlain Realty Co.* v. *Brattleboro*, 260 U. S. 366, 43 S. Ct. 146, 67 L. Ed. 309, 25 A. L. R. 1195; *Von Hamm-Young Co.* v. *City and Country of California*, 29 Cal. 2d. 798, 171 A. L. R. 274, 178 P. 2d 745, supra, we find that the goods involved were in interstate commerce and that the delay

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and interruption of the transportation in these cases was not for the pleasure, will, use, convenience, desire, profit or other business exigencies of the party, or parties, and upon this point the goods were held to be immune from state taxation.

In looking at the cases wherein it has been determined that the goods were subject to state property taxation, we find that the Court has held that the delay or interruption of the transportation was for the pleasure, will, use, convenience, desire, profit or other business exigencies of the party, or parties, as in *Coe* v. *Errol*, 116 U. S. 517, 6 S. Ct. 475, 29 L. Ed. 715; *Minnesota* v. *Blasius*, 290 U. S. 1, 54 S. Ct. 34, 78 L. Ed. 131; *Bacon* v. *Illinois*, 227 U. S. 504, 33 S. Ct. 299, 57 L. Ed. 615; *Joy Oil Co.* v. *State Tax Commission*, 337 U. S. 286, 93 L. Ed. 1366; *Brown* v. *Huston*, 114 U. S. 622; *Texas & New Orleans R. R. Co.* v. *Sabin Tram Co.*, 227 U. S. 111, *supra*, and that under such circumstances the property involved while it rested in a state under such circumstances was subject to state property taxation.

This case involves a sale of a commodity in interstate commerce, "U. S. C. Title 7, Section 3"; *Dahnke-Walker Mill Co.* v. *Bondurant*, 257 U. S. 282, *supra*, the Court said:

> "The commerce clause of the Constitution, Article I, Section 8, Clause 3, expressly commits to Congress and impliedly withholds from the several states the power to regulate commerce among the latter. Such commerce is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse . . . . , where goods are purchased in one state for transportation to another the commerce includes the purchase quite as much as it does the transportation."

The Supreme Court of Nebraska appears to have given considerable attention to the decision of this Honorable Court in *Empresa Siderurgicia* v. *County of Merced*, 337 U. S. 154, 69 S. Ct. 995, 93 L. Ed. 1276, Ann., 11 A. L. R. 2d 938, supra, in deciding this case, but it is respectfully urged that the interpretation given by the Supreme Court of Nebraska was never intended by this Honorable Court to apply to a situation such as is presented here for the following reasons:

1. In the *Empresa Siderurgicia* v. *County of Merced, supra*, the purchaser on the tax date was the exclusive owner of the cement plant. He stood in the same relation of all owners of personal property on that date. He could do with it as he wished. He was under no obligation to do anything in particular with the property. It was held solely at his convenience and pleasure.

2. Petitioner in this case, in the due course of his grain business, sold a certain amount of wheat, which he owned on the contract date February 2, 1951, and was in the process of delivering it to the buyer in another state when he was interrupted in such delivery by a box car shortage over which he had no control, but as soon as box cars could be obtained the wheat, which was delayed in shipment, was thereupon shipped as quickly as possible. Any portion of the wheat which remained unshipped on the tax date because of the delay was not held for the petitioner's pleasure, will, use, convenience, desire, profit or other business exigencies. As in the *Hughes Bros. Co.* v. *Minnesota*, 272 U. S. 469, 47 S. Ct. 170, 71 L. Ed. 359, *supra*, all the evidence and circumstances show that the contract was in good faith, how it was to be complied with, and that strictly in accordance therewith it was completed. The intention of the parties in connection with their duties and obligations under the contract is fully established.

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It certainly cannot be presupposed in considering this case that petitioner would violate his contract of sale nor can the decision rest upon the premises that he might do so. The facts and all of the testimony are that he, in the regular course of business, did observe to the letter his contractual obligations in this instance.

This case deals with the shipment of grain in due course of trade and commerce between a seller in one state and a purchaser in another. The wheat sold under the contract was in interstate commerce and exportation of the wheat was a part of the fulfillment of the contract for the sale of the wheat. To sustain the decision of the Supreme Court of Nebraska would create intolerable confusion and hardship, not only upon this petitioner in this case, but upon all producers, purchasers and processors of grain. It is well known that transportation fails occasionally and if the decision of the Supreme Court of Nebraska be the law, no grain dealer can carry on a regular market of grain immediately prior to a tax date for the reason that a breakdown of transportation would cause serious losses in the operation of the business. The only alternative to the detriment of all would be to close down the grain business a sufficient time prior to the tax date to insure that he would not be unjustly taxed upon grain which is sold and delivered in the regular course of business. For all grain dealers to be compelled to adopt such a course would bring havoc to the entire grain business in Nebraska. All of which does not mean that a grain dealer is not prevented from holding grain over the tax date, if he so desires, for the exigencies of his business, knowing that it would be subject to state taxation.

The distinction in the type of cases relating to this subject was long established by this Honorable Court is plain, and to permit the decision of the Supreme Court

of Nebraska to stand in this case, is to create a new and revolutionary precedent. Not only to afford required relief to petitioner in this case but to clearly establish the law in like situations, it is respectfully urged that this Honorable Court reverse the decision herein of the Supreme Court of Nebraska.

Respectfully submitted,

CHARLES M. BOSLEY,
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T. W. Jones Grain Company.

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In The

Supreme Court of the United States

October Term, 1953.

No. 329.

T. W. JONES GRAIN COMPANY, PETITIONER,

V.

STATE OF NEBRASKA, RESPONDENT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CLARENCE S. BECK,
Attorney General,
DEAN G. KRATZ,
Assistant Attorney General,
Attorneys for Respondent.

JURISDICTION.

That a Federal question is involved in this case is not disputed by the respondent. Art. 1, Sec. 8, Clause 3, is the commerce clause of the Constitution of the United States, and our facts show that a contract was entered into between the petitioner, a Nebraska grain

company, and the Klecan Grain Company of Kansas City, Missouri, and that the contract contemplated the transportation of grain from the State of Nebraska to the State of Missouri.

QUESTION PRESENTED.

Whether grain stored in the petitioner's warehouse on March 10 (tax day), had on that date, by virtue of a contract with an outstate corporation, ceased to be a part of the general mass of property in the State of Nebraska subject to state taxation?

DECISIONS BELOW.

The respondent accepts as substantially correct the petitioner's review of the previous court decisions of this case found on page ten of his brief.

DECISION OF THE SUPREME COURT OF NEBRASKA.

The Nebraska Supreme Court applied a fundamental rule in deciding this case. That rule, set out in syllabus number 8 (R43), is from the case of *Coe* v. *Errol*, 116 U. S. 517, 6 S. Ct. 475, 29 L. Ed. 715, and says as follows:

> "Goods do not cease to be part of the general mass of property in the state, subject as such to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another state or have started upon such transportation in a continuous route or journey."

Syllabus number 9 (R43) sets out another fundamental rule:

"The fact that property is intended or destined for removal from a state into another state does not impress it with the character of interstate commerce so as to render it immune from state taxation by virtue of the operation of the commerce clause of the federal Constitution."

STATEMENT OF FACTS.

The petitioner is a grain broker engaged in the business of buying and selling grain. His place of business is Trenton, Hitchcock County, Nebraska. On February 2, 1951, he entered into a contract with the Klecan Grain Company of Kansas City, Missouri. The contract was for ten cars of grain, and contained the following conditions (Exhibit No. 6, R39 and 40): (1) All cars must be loaded to not less than capacity required by the railroads; (2) Grain must be shipped within sixty days; and (3) Delivery of the grain on the contract could not be perfected until the grain reached its destination and was inspected and weighed.

There is no specific showing as to how much grain the petitioner had on hand on the date of entrance into the contract (Feb. 2). Testimony shows that petitioner had grain on hand valued at $19,915.00 on February 10 (R29), eight days subsequent to his entering the contract with the Klecan Grain Co., and there is also testimony to the effect that this figure ($19,915.00) was reached through an evaluation of $1.00 per bushel (R18) which indicates there was probably about 20,000 bushels of grain in the warehouse on the date of entering the contract.

By March 10, 1951, tax day in the State of Nebraska (Sec. 77-1201, R. R. S., 1943, Nebraska), only five car-

loads of grain had been shipped under the contract (R32). The remaining five carloads of wheat, constituting approximately 10,000 bushels of grain, were all received by the Klecan Grain Company subsequent to March 10, 1951.

On March 10, 1951, petitioner had in his warehouse over 10,000 bushels of grain. He reported, on his tax return, approximately 150 bushels (R27 and 25). The other approximate 10,000 bushels he did not report for taxation as he claimed it did not belong to him, but belonged to the Klecan Grain Co. of Kansas City, Missouri (R22,23).

Payment for the grain in this transaction was arranged by attaching a sight draft to the bill of lading when the grain was dispatched (R34). When the grain arrived at its destination it was inspected, the grade determined, and the final price then set (R35). In each instance the price on the sight draft varied from the price set after the arrival of the grain at its destination (R35).

ARGUMENT.

That a federal question is involved in this case is not disputed. The question, however, is one that has been presented to this court before, and thus should not be considered again.

The law in this case has been settled since 1886, when the U. S. Supreme Court decided the case of *Coe* v. *Errol*, 116 U. S. 517, 6 S. Ct. 475, 29 L. Ed. 715, and established the following rule:

> "* * * goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey."

This rule has been variously applied since that date, and stands as the applicable rule of law in the case presented to you in this instance by the T. W. Jones Grain Co. The rule is easily applied to our situation: The grain quite obviously had not been shipped on March 10; it had not been entered with a common carrier on March 10, as it rested in the warehouse on that date; and it had not been started upon such transportation in a continuous route or journey.

Appellee rests his appeal on the contention that the grain, by virtue of the contract, had begun its movement in a continuous route or journey into interstate commerce. This contention has absolutely no merit.

The Nebraska Supreme Court's recital of the facts of this case contains the following (R43,44):

> "Appellee had in the elevator about 20,000 bushels of wheat on February 2, 1951, and it on that date by contract in writing obligated itself to sell to Klecan Grain Company, Kansas City, Missouri, 10 capacity boxcars of No. 1 hard wheat of stated grades and specified prices to be delivered within 60 days to the purchaser f. o. b. at Kansas City, Missouri."

And at another point (R46) the Nebraska Court says this:

"The grain in question was owned by appellee and was in its elevator in Trenton as early as February 2, 1951. It was not selected, identified, or set apart as the wheat or any part of the wheat contracted to be sold and delivered to the Klecan Grain Company of Kansas City, Missouri. It could not have been because the contract designated that city as the place for determination of the grain that would be acceptable in satisfaction of the contract."

Thus, when appellee entered this contract he had mingled together in his warehouse 20,000 bushels of grain. He contracted to deliver to the purchaser, Klecan Co. of Kansas City, Missouri, 10,000 bushels of grain, but, of course, there was no specification that it be any particular portion of the grain then on hand. As a matter of fact, it needn't be any of the 20,000 bushels then on hand, but could be some purchased by the appellee at a later date. Therefore, since the Klecan Grain Co. had not contracted for any specific grain, the appellee was free to dispose of the grain he had on hand on the 2nd day of February and that grain he had on hand on the 10th day of March in any way he pleased, the only condition being that he deliver 10,000 bushels of grain (any grain) within 60 days after entering the contract. The 10,000 bushels on hand on March 10 did not belong to the Klecan Grain Co., and appellee was under absolutely no obligation to send it to Kansas City. He could have sold it in Nebraska, acquired another 10,000 bushels of grain, and shipped that grain to the Klecan Co. in complete satisfaction of the contract.

Clearly, the 10,000 bushels of grain in appellee's warehouse on March 10 had not started a continuous

route or journey. It could have been diverted at any time thereafter without violation of any contractual obligation. On March 10, it belonged only to the appellee, and under the established rule of *Coe* v. *Errol*, supra, it should have been taxed to him.

Appellee, in behalf of his contention that this grain had on March 10 already started its continuous journey, cites to you cases where the merchandise had actually begun the journey towards its destination. Cases such as those involving logs which have started down the river and then come to rest temporarily in some location. Those cases, of course, have no application here, and the decision of the Nebraska Supreme Court in the instant matter does not contradict any precedent established therein. In spite of all his avowals regarding the failure to obtain railroad cars and his assertion that the goods were not retained for his pleasure, will, use, convenience, etc., appellee cannot avoid the fact that this grain rested in appellee's warehouse on March 10, it was not the specific grain which the Klecan Grain Co. contracted for, it had not in any sense (such as the merchandise in appellee's citations) started its journey, it belonged only to the appellee, and was his to do with whatever he wished.

The rule in the case of *Coe* v. *Errol*, supra, has been explained an interpreted as follows by this court:

> "Thus, it is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it. The property must have been actually started upon its journey or transit to the foreign destination."
>
> *Empresa Siderurgica, S. A.* v. *Merced County*, (1949) 337 U. S. 154.

"It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice."

Empresa Siderurgica, S. A. v. *Merced County,* (1949) 337 U. S. 154.

"It must appear that the movement for another State has actually begun and is going on."

Hughes Bros. Timber Co. v. *Minnesota,* (1926) 272 U. S. 468.

"The mere fact that a portion of an entire lot of goods purchased for export has been shipped out of the country on the tax date does not impress the remainder with the character of export so as to exempt it from local taxation."

Empresa Siderurgica, S. A. v. *Merced County,* supra.

"The safer and better rule is the one indicated, to consider property actually in transit as belonging to the place of its destination, and property not in transit as property in the place of its situs, without regard to the intention of the owner, or his residence in or out of the state."

Carrier v. *Gordon,* (1871) 21 Ohio St. 605.

"Not only is a mere intention to export an article or commodity insufficient of itself to exempt it from state taxation, but the rule appears to be that a movement merely in preparation for export—in other words, a mere transfer of the property to a depot or other place within a state from which the transportation or journey to another state is to begin at a convenient time, is not a part of that transportation, so as to exempt the property be-

cause of such transfer or movement, from state taxation."

Champlain Realty Co. v. *Brattleboro,* 260 U. S. 366, 67 L. Ed.

"Until the property is shipped or started on its final journey out of the state, it may be taxed."

Diamond Match Co. v. *Otonagon,* (1903) 188 U. S. 82.

"The mere fact that interstate movement is contemplated, if it has not begun, does not withdraw the property from the state's power to tax it."

Minnesota v. *Blasius,* 78 L. Ed. 131, 290 U. S. 1.

"So in this case it is not enough that on the tax date there was a purpose and plan to export this property. Nor is it sufficient that in due course that plan was fully executed. Part of the plant that is taxed was dismantled, but it had not been delivered to any carrier for export or otherwise started on its journey on the tax date. It might still have been diverted into the domestic market. The fact that any such diversion would entail a breach of contract, that a part of the plant had already started on its export journey, that an export license had been obtained and a letter of credit deposited in this country increased the expectation on the tax date that exportation of the entire plant would eventuate. But that prospect, no matter how bright, does not start the process of exportation."

Empresa Siderurgica v. *County of Merced,* supra, 93 L. Ed. 1276, 337 U. S. 154.

"While in storage, the gasoline might have been diverted to domestic markets without disruption of any existing arrangement for its transhipment and without even breach of any contractual commitment to a foreign purchaser. Neither the character of the property nor any event equivalent to

> its redelivery to a common carrier made export certain for all practical purposes."
>
> *Joy Oil Co.* v. *State Tax Commission,* 93 L. Ed. 1366, 337 U. S. 286.

The Kentucky Court, in *Ayer & Lord Tie Co.* v. *Koewn,* 93 S. W. 588, interpreted and applied the rule of the Coe case as follows (on rehearing):

> "Under the allegations of the petition appellant might have sold the ties while waiting for the barges to be loaded on, or it might have changed its plan and shipped them to some point in this state. There is nothing to show that appellant had lost control over the property, or that it had started finally on its journey out of the state."

The important facts in this case, so far as an evaluation of appellee's argument and cases in support thereof are concerned, are (1) that the Klecan Grain Co. did not contract with the appellee, T. W. Jones Grain Co., for any specific, designated, identified 10,000 bushels of grain, and therefore the grain in appellee's warehouse on March 10 belonged only to the appellee and could have been diverted in any manner without disrupting any existing arrangement for its shipment to Kansas City, Missouri, and (2) that the grain was in the warehouse on March 10, with other grain, had not been separated or set apart, had not been placed in any vehicle which could be termed a common carrier, and had not, by any stretch of construction, "begun" a movement in interstate commerce.

These important facts distinguish appellee's cases and make this case one which falls directly under the rule of *Coe* v. *Errol,* supra. The issue involved in this case,

then, was decided 67 years ago. It has been confirmed countless times since that date, and in the Empresa Siderurgica case this court applied the rule of the Coe case to a fact situation identical to the one presented to you in this case. If this court deems the rule established in the Coe case to be wrong, or if you feel your interpretations of this rule, as set out in the Empresa Siderurgica case and other cases cited herein, are wrong, then you should by all means grant the writ of certiorari in this case. If you deem those decisions to be correct, then you must conclude that the law is well settled in the instant situation, and that you are far too busy to spend any time with a matter which was decided sixty-seven years ago.

We respectfully submit that the writ of certiorari in this case be denied.

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